SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-47

ELAINE M. ORR,

Petitioner,

v.

FRANK R. MacNEILL & SON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ROBERT W. HERVEY, ESQUIRE and
RICHARD H. W. MALOY &
ASSOCIATES, P.A.
370 Minorca Avenue
Coral Gables, Florida 33134 (443-2551)

MIAMI REVIEW — 371-4853 — 377-3721

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

ELAINE M. ORR, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled case on April 10, 1975.

CITATIONS TO OPINIONS BELOW

The District Court's decision has not been published. The decision of the United States Court of Appeals, Fifth Circuit, has been published in 511 F.2d 166.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. §1254; 42 U.S.C. §2000e, et seq.; 42 U.S.C. 2000e-2, et seq.; 29 U.S.C. 206(d)(1); 29 U.S.C. 206(d)(l)(iv), as well as Rules 19, 20, 22 and 23 of the Rules of the Supreme Court of the United States. Certiorari is sought to review the judgment of the United States Court of Appeals, Fifth Circuit, which said judgment was entered April 10, 1975.

QUESTIONS PRESENTED

Whether the United States Court of Appeals exceeded its authority in reversing the District Court, sitting as the trier of fact, which found that Petitioner proved that she performed work substantially equal to male employees but that the Respondent was guilty of sex discrimination against her.

STATUTES INVOLVED

42 U.S.C. §2000e, et seq.

42 U.S.C. §2000e-2, et seq.

29 U.S.C. §206(d)(l)

29 U.S.C. §206(d)(l)(iv)

STATEMENT OF THE CASE

The Petitioner, who was the Plaintiff in the trial court, the U.S. District Court for the Southern District of Florida, filed a complaint for violation of her civil rights against the Respondent, Frank R. MacNeill & Sons, Inc., seeking damages in excess of Ten Thousand and no/100 ($10,000.00) Dollars, attorney's fees, costs and other such relief that the court would deem proper. The trial judge, sitting without a jury on June 11, 1973, entered his findings of fact and conclusions of law finding that the Respondent violated the applicable statutes because it discriminated against Petitioner on the basis of her sex. (App. #12). On June 28, 1973, the trial judge entered a judgment in favor of Petitioner-Plaintiff against the Respondent-Defendant, in the sum of $12,480.00 as damages and ordered in that judgment that her attorney's fees and costs shall be taxed against the Respondent-Defendant. (App. #20). The Respondent-Defendant appealed the final judgment and the United States Court of Appeals, Fifth Circuit, on April 10, 1975, reversed the District Court.

This is a classic case where there was conflicting testimony on the critical issue of whether the Respondent discriminated against the Petitioner, a woman, by denying her equivalent salary to that paid male employees, although she performed equal work for the Respondent, Frank R. MacNeill, Inc.

The Petitioner testified that in February, 1963, she became manager of the accounting department and vice president of Frank R. MacNeill, Inc.; that as part of her duties, she had charge of receiving and disbursing money,

signed all the checks for all the corporations involved in the business, did all the purchasing for the company, handled the maintenance of the building and the maintenance and repairs of the equipment; that at the time there was a casualty department, fire department, supply department, accounting department and a separate corporation known as Insurance Servicing and Adjusting, which was referred to as the claims department. That in addition to the Petitioner's other duties, she was in charge of the supply department, although not referred to as a manager. Mr. John F. Bruns was head of the fire department and vice president of Frank R. MacNeill & Son, Inc.; Thomas B. Rogan manager of the claims department, who was made president of Insurance Servicing and Adjusting when that corporation was formed; and James Moore was manager of the casualty department. Petitioner worked closely with Mr. Rogan and helped and discussed and assisted him in the general agency operations that would affect the claims department. That she assisted Mr. Moore in his department, both as to matters regarding accounting and when his department required additional assistance pertaining to matters in the casualty department. The petitioner also assisted Mr. Bruns, who was manager of the fire department, in that she helped instruct his employees and helped to instruct him when he first came to the company, as well as when he became manager of the department. The Petitioner also contacted various agents of the company and assisted them with their accounting problems and with their problems in regards to the payment of premiums which they may have with the insurance companies which they represented. This service was performed by the Petitioner in the office and occasionally she was required to visit the agents in person. In addition the Petitioner testified that she averaged approxi-

mately 50 hours a week, and that this was required for her to keep her department up to date as much as possible. That during the time that she was the manager, she was responsible to Frank MacNeill, who at that time was president of the corporation.

In order to determine that the Petitioner performed equal work, it is necessary to ascertain the duties of the other managers of the corporation. The Petitioner testified that Mr. Rogan became manager of the Insurance Servicing and Adjusting company, which was part of the claims department of Frank R. MacNeill & Son, Inc., in 1967, and that his duties were to supervise and train adjusters, the review of claims, generally instruct people under him in the handling of the company's claims, and to issue loss drafts. This statement was corroborated by Mr. Rogan when he was called as an adverse witness by the Petitioner, and his testimony reflects that the only addition to the Plaintiff's testimony was that Mr. Rogan also hired and fired the personnel in his department. Mr. Rogan testified that he did have occasion to contact the Petitioner in regards to accounting matters for his department, and that as to any major purchase, that was under the cognizance or supervision of the Petitioner, Mrs. Orr. Mr. Rogan stated that the function of the accounting department, which was under the management of the Petitioner, and the claims department, which was under his management, were equal in importance to the overall operation of the agency.

The Petitioner testified that James Moore was manager of the casualty department and that his duty was to underwrite the casualty business which would be accept-

able to the insurance company; that Mr. Moore would review the various applications for insurance policies in order to underwrite the business.

In the case of *Schultz v. American Can Company*, 424 F.2d 356 (1970), the Court stated

> "Congress, in using the terms 'equal work' and 'equal effort' in the Equal Pay Act, did not intend jobs to be identical to be equal, but intended only that they require the same effort, skill and responsibility."

The controlling factor under the Equal Pay Act is job content; that is, the actual duties that the respective employees are called upon to perform. *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (1970).

The case of *Hodgson v. Robert Hall Clothes, Inc.*, 326 F.Supp. 1264 (1971), directs itself to the issues before the Court in the instant case. That case was concerned with the differential in pay between salesmen and salesladies employed by the Defendant, Robert Hall Clothes. The Defendant argued that the job of selling in the men's department differs substantially from that in the women's department because of difference in the character, price, profitability, markup and markdown in the merchandise sold. Defendants further argued the job content of salesmen and saleswomen differs with respect to the type of training received; the work required of men in completing the back of cash alterations sales slips, their alteration and fitting responsibilities, and the use of sizing charts and tape measures in connection with fittings. That generally speaking, the prices, profitability and markups were high-

er in men's wear than in women's wear, and the markdown differences were less in the case of men's wear than in women's wear. The Court found, however, that these variances were not so great as to make any significant differences in the effort, skill and responsibility required between salesmen and salesladies in performing their jobs. The testimony which the defense presented in the *Hodgson v. Robert Hall Clothes, Inc.* case is basically the same as used by the Respondent in this case, to wit: that economic considerations were the sole reasons for the compensation differential and that sex had nothing to do with it. However, the Court in *Hodgson v. Robert Hall Clothes, Inc.* found that although the jobs were different, they were not unequal within the meaning of the Equal Pay Act. In fact, it must be pointed out that the District Court Judge hearing this matter noted in his opinion that until 1967, the petitioner was the highest paid of the four department heads (App. #12). Shortly after 1967, the then president of Frank R. McNeill & Son, Inc., Mr. Frank R. McNeill, due to illness was forced to work a reduced scheduled (App. #37) and delegated more of his corporate duties to his son, whom it was testified about would *never* pay a woman compensation equal to that he paid a man (App. #36) even for the identical work. With the reduction of responsibilities on the part of the elder Mr. McNeill, there is a direct corrolation to the diminishing salary of the petitioner in relation to that of the other department heads as reflected by Judge Roettger's decision (App. #15). Therefore, it is submitted that the Trial Court could and did find, upon the basis of the testimony presented, that the Petitioner's job requirements as manager of the Accounting Department, vice president of the Respondent corporation, licensed insurance agent, authority to sign and disburse funds, the maintenance of the premises, and

the purchase of the equipment and supplies for the business were equal insofar as the skills and responsibilities and efforts were concerned, when compared to the effort, skills and responsibility of the other managers of the Defendant corporation. This equality was recognized by the employer when, for a period of two years prior to the commencement of Respondent's course of discrimination Petitioner received equal compensation with the highest paid manager.

The United States Court of Appeals, Fifth Circuit, reversed the District Court's judgment and in doing so it violated the well-known and well-followed principle of appellate law that a court of review will not essay an independent evaluation of evidence since this is the function of the trial court. See Graver Tank & Mfg. Co. v. Linde Air Products Co. 339 US 605, 94 L.Ed. 1097, 70 S.Ct. 854, reh. den .340 US 845, 95 L.Ed. 620, 71 S.Ct. 12.

Examples of the United States Court of Appeals' usurping the trial court's functions of weighing the evidence are the following:

1. The United States Court of Appeals found that Malcolm MacNeill was the operating head of the Respondent corporation and that he had charge of fixing salaries, whereas the trial court found there was conflicting attitudes on the part of the principal officers.

2. The Appellate Court found that the duties of other managers require an exercise of discretion and sets forth in detail their duties. The Appellate Court ignored, however, the importance of the positions held by the Petitioner, including being a licensed insurance agent.

3. The District Court believed the testimony of the Petitioner with regard to her conversations with Frank R. MacNeill concerning her not receiving equal pay. The Circuit Court chose to discredit that testimony.

4. The Court of Appeals in rejecting the District Court's conclusion that the fact that the Petitioner's successor was receiving equal salary to her though less experienced, was evidence of lack of discrimination and made a finding of fact, not in the record, that the successor's work was done as well as was the Petitioners.

5. The Appellate Court chose to use the fact that at one time no discrimination existed as evidence that no discrimination existed at the time complained of in the Plaintiff's complaint. Such procedure on the part of the Appellate Court is improper in the absence of a finding that the trial court's findings of fact are erroneous.

6. The Appellate Court apparently completely overlooked the District Court's analysis of the instant case as not being a typical production line case; that this case involved management positions which were not completely identical to one another. This is not the typical production line, retail clerk or bank teller situation where the job requirements can be calibrated in minute detail.

7. The Appellate Court overlooks the testimony given by Messrs. Bruns and Rogan as to the assistance given their department by the Petitioner in detailing her job responsibilities. The Appellate Court offers no reason for ignoring this finding on the part of the trial court and this finding was one of the findings upon which the judgment of the trial court was entered.

The United States Court of Appeals, Fifth Circuit, in their decision, which the Petitioner seeks to have reversed in this Court, has interpreted the statutes involved as requiring that before violation can be shown the positions held by the male and female employee must be mirror images of each other. Such was not the intention of Congress in enacting these statutes. Congress certainly intended to include within the purview of the statutes, management personnel — no two management positions will hardly ever be identical.

As to Mr. Bruns, who was manager of the fire department, the Petitioner testified that his duties consisted of handling the underwriting for the fire department and approved and disapproved risks which might be acceptable to the general agency and to the companies they represented. Further, Mr. Bruns contacted agents, visited the various companies and prospective companies to get additional facilities for the general agency. In essence, he was in a production capacity. This testimony was corroborated by Mr. Bruns when the Petitioner called him as a witness, and he stated that he learned the business by sitting at the underwriting desk to learn the various commission schedules and underwriting philosophies of the company. Mr. Bruns also stated that he sought the Petitioner's advice pertaining to the normal operations and office procedures and technical things with which he was unfamiliar since he had been in the field but not in the office. Some of these procedures included underwriting, coding, bookkeeping, accounting and any other problem with which he was unfamiliar. Mr. Bruns testified that Mrs. Orr was conversant with the operation of his department and that he sought her advice. Mr. Bruns was also able to state that he was familiar with the duties

which were performed by the Petitioner, Elaine M. Orr. He stated that she was not always in the accounting department, that she had had various duties in the company; that she had performed whenever the need arose and would attempt to do a job for the MacNeills. Mr. Bruns also stated that the importance of the accounting department was equal to that of the fire department. On cross examination, Mr. Bruns stated, "Mrs. Orr was thoroughly familiar with all of the aspects of my department, and therefore I consulted in her and received advice as to the best way to properly handle it as far as an office manager, because I had never been a manager, so to speak, before."

The comparative salaries of the four department heads was admitted into evidence and were set forth in the trial court's Findings of Fact and Conclusions of Law, and these are correct, except for the year 1967, when the Petitioner received $12,012, Mr. Bruns received $15,002.00, and Mr. Rogan received $14,001.00. It is the differentiation of salary increases commencing in the year 1967, that brought the controversy into full focus when the Petitioner filed her Complaint. At the time when the Petitioner's 1967 salary was less than Mr. Bruns, she did complain to Frank R. MacNeill, who stated to her "Well, my son would not approve you making as much as the men". Mr. MacNeill requested that she give him time and he would try to come up with a solution. Apparently the salaries were not increased in 1968, so that it was 1969 when another raise became apparent and a differentiation was still apparent, at which time the Petitioner complained to Frank MacNeill in January, 1969, about the increases. At this time, the Petitioner said to Mr. MacNeill that she did not understand why there was a differentiation in salary, inasmuch as the managers were working in the

same capacity and that the jobs were equally important, also that the Petitioner knew as much or more about the general operation of the agency than anybody in the company. In reply, Mr. Frank MacNeill said that his son, Mr. Malcolm MacNeill, would not pay a woman as much as a man, but he (meaning Frank MacNeill) would try to work it out. This performance was repeated in January 1970, and Frank MacNeill still requested more time to work things out, promising that there would be other options available to the managers. Mr. Frank MacNeill, in answer to various inquiries made by the Petitioner, continued to stall her by telling her that he needed more time and that something would be worked out. During the time the Petitioner was making these inquiries and conferring with Mr. Frank MacNeill, Mr. MacNeill acknowledged that money was due Petitioner, and that it would be easier to replace any of the men managers than it would to replace the Petitioner.

The Equal Pay Act [29 U.S.C. 206(d)] was enacted in 1963, one year before the passing of the 1964 Civil Rights Act (Title VII (42 U.S.C. 2000e-2). Although the Civil Rights Act also applies to sex-based wage discrimination, it does not replace the earlier Act. In many respects, the goal of eliminating sex-based wage discrimination is central to both the Equal Pay Act and the Civil Rights Act sex discrimination provisions.

While the scope of the Civil Rights Act is in one sense much broader than the Equal Pay Act, dealing as it does with equal employment opportunity as well as wage discrimination, much of its thrust with respect to employment opportunity also affects the question of wage discrimination. In fact, §2000e-2h of the Civil Rights Act provides in

part that it is not an unlawful employment practice under Title VII of the Civil Rights Act for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of the Fair Labor Standards Act of 1938 as amended and set forth in 29 U.S.C. 206(d). Therefore, it would follow that 42 U.S.C. 2000e-2 does not incorporate the "equal work" requirement of 29 U.S.C. 206(d) in that we are dealing with two separate and distinct statutes, even though one makes reference to the provisions of the other whereby wages or compensation which may be paid to employees may be paid on the basis of a differentiation if falling within those exceptions which are common to both statutes.

The action before the Court was brought pursuant to the 1964 Civil Rights Act, 42 U.S.C. §2000(e), et seq. Said Act refers to a pay differential if authorized by the Equal Pay Act of 1963, §206(d)(1), in accordance with the following exceptions:

a) A Seniority system,

b) A merit system,

c) A system which measures earnings by quantity or quality of production, or

d) A differential based on any other factor other than sex.

In the case of *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (1970), the Court, in referring to the Equal Pay Act,

stated that the Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it. The Court went on to say that the Civil Rights Act is much broader than the Equal Pay Act, and its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act.

Respondent has attempted to place itself within the requirements of the Equal Pay Act by asserting that the other managers' jobs were more important to Respondent corporation, and that the other managers produce revenue while the Plaintiff did not. These defenses fail as not being within the exceptions of the Equal Pay Act, and further fail as the Court held in *Schultz v. Corning Glass Works*, 319 F.Supp. 1161 (1970) that the four exceptions to the Act are affirmative defenses which must be pleaded and proved by a Defendant employer. No such defenses were pleaded in the case before the Court.

In *Schultz v. Wheaton Glass Company*, supra, an action was brought under the Equal Pay Act. This case made reference to the Civil Rights Act and stated although the Civil Rights Act is much broader than the Equal Pay Act, its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act. The Court further stated that since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which, by virtue of §206(d), would undermine the Civil Rights Act. The Court found in this case that the

Plaintiff had clearly established a prima facia case that the wage differential was based on sex and therefore the burden of proof fell on the Defendant to prove its claim that it came within the exceptions as contained in §206(d) of the Equal Pay Act.

The case of *Wirtz v. Basic, Inc.*, 256 F.Supp. 786 (1966), which was also brought under the Equal Pay Act, stated that in applying the law it establishes an objective standard requiring that a judgment be based upon the requirement of particular jobs being compared rather than skill, effort or training and previous experience. Therefore, it would seem to follow that jobs which were equally important to the welfare of the employer in the operation of the business would be designated as equal and come within the provisions of the law as determined by the case histories.

The case of *Ammons v. Zia Company*, 448 Fed.2d 117 (1971), was an action brought under the Civil Rights Act prohibiting discrimination in employment classifications and compensation based on sex. The Court stated that one who asserts violation of the statute has the burden of proving that the wage differential is based on sex discrimination; but if a prima facia case of discrimination is established, the burden falls upon the Defendant to prove that the differentiation is based on any factor other than sex.

CONCLUSION

The ruling of the United States Court of Appeals for the Fifth Circuit is contrary to the Equal Pay Law and The Equal Employment Opportunities Act. This Court should issue its Writ of Certiorari to reverse the ruling of the United States Court of Appeals for the Fifth Circuit and reinstate the judgment of the United States District Court for the Southern District of Florida.

Respectfully submitted this 9th day of July, 1975.

ROBERT W. HERVEY,
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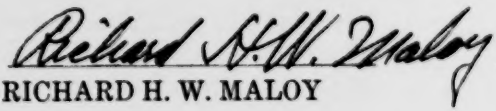
By: 
RICHARD H. W. MALOY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed to: FRATES FLOYD PEARSON STEWART PROENZA & RICHMAN, P.A., Attorneys for Respondent, Twelfth Floor Concord Building, Miami, Florida 33130, this 9th day of July, 1975.

Richard H. W. Maloy

RICHARD H. W. MALOY

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TITLE 42.—
THE PUBLIC HEALTH AND WELFARE

SUBCHAPTER VI.—
EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions.

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trust, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26: Provided, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered

employers, and during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer,

or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(Pub. L. 88-352, title VII, § 701, July 2, 1964, 78 Stat. 253; Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662.)

§ 2000e—2. Unlawful employment practices.

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

(b) Employment agency practices.

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices.

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs.

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations.

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security.

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under the subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians.

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a

preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. (Pub. L. 88-352, title VII, § 703, July 2, 1964, 78 Stat. 255.)

REFERENCES IN TEXT

The Subversive Activities Control Act of 1950, referred to in subsec. (f), is classified principally to subchapter I of chapter 23 of Title 50, War and National Defense.

EFFECTIVE DATE

Section effective one year after July 2, 1964, see section 716(a) of Pub. L. 88-352, set out as a note under section 2000e of this title.

TITLE 29—LABOR § 206(d)(1)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-698-Civ-NCR

ELAINE M. ORR

Plaintiff

vs.

FRANK R. MacNEILL & SON, INC.

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed June, 11, 1973]

Plaintiff Elaine M. Orr has brought suit against Frank R. MacNeill & Son, Inc., her former employer, alleging discrimination on the basis of sex, in violation of Title 7 of the Civil Rights Act of 1964. She filed a Complaint with the Equal Employment Opportunity Commission and received the notice of a right to sue and filed suit within the time limitation thereafter.

The testimony revealed a fairly predictable drama. Plaintiff began working for the defendant corporation, a general insurance agency, in 1952 and at that time there were only four employees. Then she assisted in bookkeeping and the handling of claims, distribution of mail, and in whatever way possible. By January, 1971, when plaintiff terminated her employment because the defendant refused to increase her salary to match that of the other

two department managers who were also vice presidents (one is the equivalent), there were 60 employees.

Two persons are the driving forces in the defendant corporation: Frank R. MacNeill, nearly 88, who still spends at least three to four hours per working day in the office, and his son, Malcolm MacNeill, the vice president of the corporation, who testified that he is in charge of the operations of the company. The plaintiff claims that the senior MacNeill told her to come talk with him if she ever had any problems and that he was still running the show.

The Court concludes that these apparently conflicting attitudes on the part of the principal officers of the defendant corporation reflect the feelings of these two officers and may account in some measure for the events as they unfold.

During the years 1967 through 1970 the defendant agency was an organization divided into four departments: fire, casualty, accounting and claims. Plaintiff had been a vice president of the corporation since 1964 and was in charge of the accounting department. Bruns was also a vice president and he was in charge of the fire department; Moore was not a vice president and was in charge of the casualty section; Mr. Rogan was in charge of the claim section, but a separate corporation had been set up to handle claims and he was the president of that corporation, a subsidiary of the defendant, but Rogan was not a stockholder of the separate corporation.

The following is a table setting forth the comparative salaries of the four department heads during the years in question.

SALARIES

As of April	ACCOUNTING ORR	FIRE BRUNS	CLAIMS ROGAN	CASAULTY MOORE
1966	$10,400	$10,400	$ 9,100	$ 8,996
1967	11,700	11,310	10,010	10,010
1968	12,012	15,002	14,001	10,816
1969	13,000	15,522	15,600	12,012
1970	14,040	18,018	18,018	14,040
1971		20,072	20,072	16,120

The following is a comparison of the bonuses paid to the four department heads during these years:

	BONUS			
For the year				
1969	$ 500	$1,000	$ 500	$ 500
1970	3,500	3,500	3,500	3,500
1971	1,500	3,500	3,500	2,500

Malcolm MacNeill testified Bruns' salary was increased ahead of plaintiff's to reward him for bringing in an account and that this was the reason he received a much bigger bonus in 1969.

In 1967 when Bruns went ahead of her salary-wise, plaintiff made her complaint to Frank MacNeill; the older MacNeill advised her that his son would not approve of her making as much as a man but he would try to work it out and asked her to be patient. In January, 1969, she repeated her complaint to the older MacNeill who again advised her that Malcolm would not approve of her making as much as a man but requested that she let him discuss it and he would try to work it out. Nine months later she advised the older MacNeill she would quit unless something was worked out and in December, 1970 she announced she was resigning, effective January, 1971. He

further assured her that she wouldn't leave the company; that she would be back and that the company would keep her license, which it not only did but continued to make payments to her for its use until April, 1972. He also responded favorably to her complaints that she felt she had earned equivalent salary and was worth it. In March, 1972 he again acknowledged that he could replace any of the men easier than he could her.

Defendant's contention is that the production departments are the important part of their business and without the production you don't need accounting. Malcolm MacNeill testified that the accounting department is in no way as important as the other departments and insurance companies never pay personnel in accounting departments as much as personnel in production departments; and that this situation exists in general agencies as well.

Defendant's contention was disputed by the other two department heads, Mr. Bruns and Mr. Rogan, and the court finds an insurance agency operation of this size depends with success upon the efficient functioning of all of its departments.

Malcolm MacNeill also contends that plaintiff was an excellent employee until the last two or three years, but that her work fell off at that time; that appraisal would seem to coincide chronologically with the plaintiff's first complaint about the fact that another department manager had been increased from the same salary to one in excess of that received by her. Evidently, the disaffection was not very severe as plaintiff was receiving substantial annual raises during the period of time when her work was alleged to have decreased in quality.

Following plaintiff's resignation, defendant hired her replacement, Mr. Gaskins, who was hired at almost the same salary plaintiff had been receiving although he had considerably less experience. Defendant claims this evidence supports its position, but on the contrary it underlines the discrimination exercised against plaintiff.

Although it may well be that the plaintiff and Malcolm MacNeill had a personality clash and were simply unable to get along, this court finds that the plaintiff has shown a clear case of discrimination on the part of the defendant towards her in connection with differentiation of salaries received by her vis-a-vis that received by Mr. Bruns, in particular, and also Mr. Rogan.

Plaintiff filed suit only for the total differentiation in salaries of $12,480 claimed to be the amount between her salary during the years in question and that of Mr. Bruns and for the differentiation in bonuses totalling $2,500.00.

The court finds that the plaintiff has shown discrimination in salary based on sex.

CONCLUSIONS OF LAW

1. Plaintiff has clearly shown the salary discrimination she suffered when her salary is compared with that of Mr. Bruns resulted from sexual discrimination.

2. Despite this clear showing, it is still incumbent upon plaintiff to show that she was performing substantially equal work with Mr. Bruns and Mr. Rogan in order to recover from the defendant. This is not the typical produc-

tion line case[1] or retail clerks[2] or bank tellers[3] situation where the job requirements can be calibrated in minute detail. In this situation, defendant created four departments, three of them headed either by vice presidents of defendant-corporation or a president of a wholly owned subsidiary who was performing virtually the same functions as a vice president. Titles alone do not constitute substantially equal work; however, in the instant case defendant had created an organizational structure in which plaintiff's duties as a department head involved work in the other departments as well. In addition, in 1967 she actually was the highest paid of the four department heads, a situation which rapidly changed thereafter so that the two male department managers who were officers were paid more than she and the male department manager who was not an officer was brought even with plaintiff's salary in 1970.

3. The Court agrees with the conclusion in Hodgson v. Robert Hall Clothes, Inc., 326 F.Supp. 1264 (D.Del. 1971), that the Equal Pay Act "means that if the differential in pay is, in whole or in part, based upon sex, it is not based upon factors other than sex. Only if sex plays no part in the wage differential is it beyond the condemnation of the Act." Id. at 1275.

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[1]Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. denied, 398 U.S. 905, 90 S.Ct. 1696 (1970); Shultz v. Amer. Can Co., 424 F.2d 356 (8th Cir. 1970); Shultz v. Corning Glass Works, 319 F.Supp. 1161 (W.D.N.Y. 1970).

[2]Hodgson v. City Stores, Inc., 332 F.Supp. 942 (M.D.Ala. 1971); Hodgson v. Robert Hall Clothes Inc., 326 F.Supp. 1264 (D.Del. 1971).

[3]Hodgson v. Amer. Bk Comm., 447 F.2d 416 (5th Cir. 1971).

4. As set forth in Hodgson v. City Stores, Inc., 332 F.Supp. 942 at 947 (M.D.Ala. 1971), the law is now well settled that the positions to be compared need be only substantially similar or substantially equal in effort, skill, or responsibility and working conditions, citing Hodgson v. Amer. Bk of Com., 447 F.2d 416 (5th Cir. 1971) and Shultz v. Amer. Can. Co., 424 F.2d 356 (8th Cir. 1970).

5. The Court concludes that, based on the unique fact situation in this case, plaintiff is entitled to recover differences in salary between her salary and that of Mr. Bruns for the years 1968 thru 1970, inclusive. See Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. denied in 398 U.S. 905, 90 S.Ct. 1969 (1970).

The Court concludes that the jobs in this case are not as "substantially equal" as the ones in other cases[4] where recovery has been permitted; however, to deny plaintiff recovery because of the dissimilarities when such blatant discrimination exists, would be to restrict Title VII of the Civil Rights Act by the Equal Pay Act—a construction surely not intended by Congress or approved by the Courts. See Shultz v. Wheaton Glass Co., supra.

6. The Court concludes the plaintiff is not entitled to recover on the alleged discrimination in connection with the yearly bonuses because of its finding that the differentiation was based on reasons other than sex.

7. Counsel are to submit attorneys' affidavits in connection with the award of attorneys' fees within ten

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[4]e.g. Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228 (5th Cir. 1969).

days and the Court will order attorneys' fees based on the affidavits submitted and the consideration of the record without a hearing.

DONE AND ORDERED at Miami, Florida, this 11th day of June, 1973.

/s/ Norman C. Roettger, Jr.
United States District Judge

cc-Robert W. Hervey, Esq.
370 Minorca Avenue
Coral Gables, Florida 33134

cc-Alan G. Greer, Esq.
Frates, Floyd, Pearson, Stewart,
Proenza, Richman, P.A.
12th Floor, Concord Building
Miami, Florida 33130

[TITLE OMITTED]

FINAL JUDGMENT FOR PLAINTIFF

[Filed June 20, 1973]

The above-entitled action came on for trial before the Court sitting without a jury; the Court heard the testimony and considered the evidence, and thereafter made its Findings of Fact and Conclusions of Law. Based on said Findings of Fact and Conclusions of Law made and entered herein,

IT IS ORDERED AND ADJUDGED that Plaintiff, ELAINE M. ORR, recover judgment against Defendant, FRANK R. MacNEILL & SON, INC., in the sum of Twelve Thousand Four Hundred Eighty ($12,480.) Dollars, and further recover from Defendant attorney's fees and costs to be assessed and taxed upon final determination by the Court.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 28 day of June, 1973.

/s/ Norman C. Roettger, Jr.

United States District Judge

United States Court of Appeals,
Fifth Circuit.

No. 73-3063.

Elaine M. ORR, Plaintiff-Appellee,
v.

FRANK R. MacNEILL & SON, INC.,
Defendant-Appellant,

April 10, 1975.

In an action for damages from sex discrimination in compensation to an employee, the plaintiff employee recovered in the United States District Court for the Southern District of Florida, at Miami, Norman C. Roettger, Jr., J., and the employer appealed. The Court of Appeals, Jones, Circuit Judge, held that evidence as a whole failed to sustain the district court's determination that the job of the plaintiff was "substantially equal" to other jobs, performed by men, or that there had been any discrimination by reason of sex. Where duties of the various employees were greatly dissimilar, even though each was manager of a department, the performance of their jobs could not be characterized as equal work for purposes of the sex discrimination statutes.

Reversed and remanded.

1. Courts — 406.3(2)

Court of Appeals accepted district court's determination on credibility of witnesses.

2. Civil Rights — 44(5)

In equal employment opportunity case, evidence that employer paid female worker's male successor almost same salary as she had been receiving although he was less experienced was not probative of sex discrimination in absence of evidence that successor's work was not done as well. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

3. Civil Rights — 44(5)

Evidence as a whole, in equal employment opportunity case, failed to sustain district court's determination that job of plaintiff female worker was "substantially equal" to other jobs, performed by men, or that there had been any discrimination by reason of sex. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. §2000e-2(a).

4. Statutes — 223.1

Sex discrimination provisions of Title VII of Civil Rights Act of 1964 must be construed in harmony with Equal Pay Act of 1963. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, §703(a), 42 U.S.C.A. § 2000e-2(a).

5. Civil Rights — 43

To establish case under sex discrimination provisions of Title VII of Civil Rights Act of 1964, it must be proved that wage differential was based upon sex and that there was performance of equal work for unequal compensation; the jobs in question need not be identical, but they must be substantially equal. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

6. Civil Rights — 9.14

Where duties of various employees were greatly dissimilar, even though each was manager of department, the performance of their jobs could not be characterized as equal work for purposes of sex discrimination provisions of Title VII of Civil Rights Act of 1964. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

Christian D. Searcy, Alan G. Greer, Ray H. Pearson, Miami, Fla., for defendant-appellant.

Robert W. Hervey, Coral Gables, Fla., for plaintiff-appellee.

Appeal from the UnitedStates District Court for the Southern District of Florida.

Before JONES, THORNBERRY and COLEMAN, Circuit Judges.

JONES, Circuit Judge:

In a trial before the court without a jury, Elaine M. Orr recovered judgment against Frank R. MacNeill & Son, Inc., in an action for damages from sex discrimination in compensation as an employee. It has appealed.

The appellant is a rather large insurance agency in Miami, Florida. In the findings and conclusions of the District Court it is stated that:

> "Two persons are the driving forces in the defendant corporation, Frank R. MacNeill, nearly 88, who still spends at least three to four hours per working day in the office, and his son, Malcolm MacNeill, the vice president of the corporation, who testified that he is in charge of the operations of the company. The plaintiff claims that the senior MacNeill told her to come talk with him if she ever had any problems and that he was still running the show."

Notwithstanding Mrs. Orr's claim that the senior MacNeill said that he was "running the show," the events demonstrate that Malcolm MacNeill was the operating head of the agency with respect to the fixing of Mrs. Orr's compensation.

The appellee, Elaine M. Orr, went to work for the agency in 1962, it then had four employees. At the end of 1970, the critical time in this controversy, there were over forty employees. In and after 1967 the organization con-

sisted of four departments, Fire Insurance, Casualty Insurance, Claims and Accounting.

John F. Bruns, the head of the Fire Insurance Department, was originally employed by MacNeill as a Special Agent or Field Representative. He continued in that capacity after becoming a Vice President and Manager of the Fire Insurance Department. In addition to his General Supervisory activities in the Fire Insurance Department, his duties included handling the underwriting of the Fire Insurance Department and approving or disapproving fire risks. His primary responsibility and activity was the production of business. Bruns contacted agents, collected overdue accounts, and sought to develop new business for the agency. Upon one or more occasions Bruns established commission arrangements with a company represented by the agency. Malcolm MacNeill testified that this "takes a lot of savvy."

The Casualty Insurance Department was in charge of James Moore. He was responsible for underwriting the Casualty Insurance business which was acceptable to the company. This responsibility specifically involved reviewing policies written by agents or instructing someone in the department to underwrite acceptable business. When an agent had a risk which he thought might not be acceptable to the company, the agent and Moore would discuss it, and Moore would decide whether or not to accept the risk. His job, as in the case of Bruns ,required decision making and the exercise of discretion.

The Claims Department was handled through a separate corporation which was a wholly owned subsidiary of Frank R. MacNeill & Son, Inc. It was in charge of Thomas

B. Rogan. He was responsible for assigning all claims work which came into the office, for adjusting and settling claims, and for supervising, hiring, firing, and training approximately ten professional adjusters and ten clerical workers. Rogan had unlimited draft authority with several insurance and casualty companies represented by the agency. He issued loss drafts upon determining that claims should be paid. He assisted in the development of new business. His job, like those of Bruns and Moore, required the making of decisions and the exercise of discretion.

Elaine M. Orr was head of the Accounting Department. She kept the financial and other records, she and others signed checks, she purchased supplies and supervised the maintenance of the building which housed the agency. She was sometimes consulted by those in other departments but usually with respect to accounting matters.

The salaries paid to the four department heads for the years 1966 through 1970, as found by the District Court, were as follows:

As of April	FIRE BRUNS	CASUALTY MOORE	CLAIMS ROGAN	ACCOUNTING ORR
1966	$10,400.00	$ 8,996.00	$ 9,100.00	$10,400.00
1967	11,310.00	10,010.00	10,010.00	11,700.00
1968	15,002.00	10,816.00	14,001.00	12,012.00
1969	15,522.00	12,012.00	15,600.00	13,000.00
1970	18,018.00	14,040.00	18,018.00	14,040.00

For the years 1969 through 1971 bonuses were paid as follows:

For the year	BRUNS	MOORE	ROGAN	ORR
1969	$ 1,000.00	500.00	500.00	500.00
1970	3,500.00	3,500.00	3,500.00	3,500.00
1971	3,500.00	2,500.00	3,500.00	1,500.00

Mrs. Orr has informed this court that the correct salary figures for 1967 are Bruns $15,002, Rogan $14,001 and Orr $12,012. It does not appear that any effort was made to have the court's findings corrected.

It was the testimony of Mrs. Orr, credited by the District Court although in conflict with the testimony of the elder MacNeill, that she had several discussions with him about her compensation. In 1967 she complained to him that Bruns had gone ahead of her in salary. He told her, so she said, that his son would not approve of her making as much as a man but he would try to work it out. In January 1969 she complained again to the elder MacNeill. He again advised her, so she said, that Malcolm would not approve of her making as much as a man, and he again assured her that he would try to work it out. She quoted him as telling her that she was worth as much as the men. She was aware that Malcolm MacNeill had fixed Bruns' salary.

[1] It might seem that Mrs. Orr could have decided at some time before 1970 that perhaps the elder MacNeill was not "running the show," or that part of it which involved the fixing of salaries of department heads and that possibly, in this area, Malcolm MacNeill was "in charge of the operations of the company." Malcolm MacNeill testified that she did not discuss her salary with him. She testified that she did not discuss salary with Malcolm MacNeill. On further questioning she said she thought she might have talked with him for a few minutes in 1970. Further examination elicited the response "I asked him why I couldn't —you know, why they wouldn't approve it, and he said that I didn't have any business except in the Accounting Department and that these other duties and so forth that

I handled had nothing to do with it, and he just wasn't going to sign it." It might seem strange that Mrs. Orr could remember so well all that the senior MacNeill said to her on the occasions beginning in 1967 but find it so difficult to recall the conversation with the junior MacNeill. But, of course, this Court accepts the District Court's determination on credibility.

The District Court concluded that recovery by reason of differences in bonus payments should be denied because the differentiation was based on reasons other than sex.

[2] The District Court noted that, following Mrs. Orr's resignation, the agency paid her successor almost the same salary as she had been receiving although he was less experienced. The District Court stated that this "underlines the discrimination exercised against" Mrs. Orr. This deduction does not follow. If her successor's work was done as well, and the contrary is neither found nor suggested by the District Court, it might be said that he should have been paid as well, and this we think follows whether he was more or less experienced than his predecessor or of the same or different sex.

[3] The District Court, it seems, relied upon the testimony of Messrs. Bruns and Rogan, witnesses for Mrs. Orr, as the basis for the finding that "an insurance agency operation of this size depends with success upon the efficient functioning of all of its departments." Bruns testified as to the differences between the production of business and the keeping of records and stressed the job differences. He expressed the opinion that they were of equal importance. Rogan also pointed out that the functions of the Accounting and Claims Departments were not similar, that

the duties were different, and not comparable and that there was no parallel. In response to a leading question Rogan gave an affirmative answer to a query as to whether one function was just as important as another. In her testimony Mrs. Orr recognized the differences between that which she did and that which was done by Bruns and Rogan. She conceded that her accounting activities might be called a mechanical type of thing. She recognized the necessity for the use of judgment and the exercise of discretion in the production and claims departments, and conceded that this was not so in the Accounting Department except in the procurement of supplies.

To buttress its conclusion that the difference in pay between Messrs. Bruns and Rogan on the one hand and Mrs. Orr on the other was based on sex discrimination, the District Court recited that at one time she had been the highest paid of the department heads. If this is in any way relevant it would seem to indicate an absence of sex discrimination. It is recited that three of the four department heads were Vice Presidents of the company and the fourth was the President of the subsidiary corporation. Malcolm MacNeill was a Vice President and it was he who fixed Bruns' salary and declined to pay Mrs. Orr an equal amount. We know of no rule requiring that the pay of a corporate officer shall be determined by his or her title.

The District Court included in its findings the statement that the jobs in this are not as "substantially equal" as in other cases[1] where recovery has been permitted. Does this mean that the jobs in this case are less than substan-

[1]Citing Weeks v. Southern Bell Tel. & Tel. Co., 5th Cir. 1969, 408 F.2d 228.

tially equal?[2] We cannot say. We do say that the evidence does not sustain the District Court's determination that the jobs here are substantially equal. Nor is there support for its determination that there has been discrimination by reason of sex.

The District Court decided that "based on the unique fact situation in this case, Mrs. Orr is entitled to recover." To be unique a thing, be it red cow, gray horse, peppercorn or law suit, must be the only one of its kind, without an equal or an equivalent. It may be said that every case, in some way or other, is different from every other case. Nothing presented by the record of the case before us calls for the application of a unique doctrine or requires a decision other than is dictated by the principles set forth in the precedents.

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C.A. Sec. 2000e-2(a).

[4] The sex discrimination provisions of Title VII of the Civil Rights Act of 1964 must be construed in har-

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[2]There is a temptation, which will be suppressed, to discuss whether "substantially equal" is equal, whether less than equal is unequal and therefore "less than substantially equal" is also unequal. Such an exercise in syllogistic semantics would serve no useful purpose here.

mony with the Equal Pay Act of 1963, 29 U.S.C.A. Sec. 206(d). Hodgson v. Brookhaven General Hsopital, 5th Cir. 1970, 436 F.2d 719; Ammons v. ZIA Co., 10th Cir. 1971, 448 F.2d 117; Shultz v. Wheaton Glass Co., 3d Cir., 421 F.2d 259, cert. denied, 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64. The 1964 act provides that any differentiation which is authorized by Section 206(d) of the 1963 act shall not be unlawful under the Civil Rights Act of 1964. The statute provides in part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." 29 U.S.C.A. Sec. 206(d)(1).

[5] To establish a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation. Ammons v. ZIA Co., supra.

The jobs in question need not be identical, but they must be substantially equal. Brennan v. J. M. Fields, Inc., 5th Cir. 1974, 488 F.2d 443; Hodgson v. Corning Glass Works, 2d Cir. 1973, 474 F.2d 226; Hodgson v. Fairmont Supply Co., 4th Cir. 1972, 454 F.2d 490; Ammons v. ZIA Co., supra. This court has recently said:

"When Congress enacted the Equal Pay Act, it substituted the word 'equal" for 'comparable' to show that 'the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.'" Brennan v. City Stores, Inc., 5th Cir. 1973, 479 F.2d 235.

The record does not support the determination that Mrs. Orr sustained her burden of proving equal work. The District Court stated that "an Insurance Agency operation of this size depends with success upon the efficient functioning of all of its departments." However true this may be it does not follow that all who participate in the efficient functioning are doing equal work.

The only evidence of sex discrimination is the controverted statement of Frank R. MacNeill that his son would not pay a woman as much as he paid a man. Yet the fact is that at one time Mrs. Orr was paid more than any of the men who were the other department heads. The fact is that she was paid more than the man who succeeded her and who, presumably, was doing work equal to that which she had done. The fact is that she was never paid less and much of the time was paid more than the salary of Vice President Moore who was the head of the Casualty Department. The facts show that the salary differences were based upon other reasons than the conjecture of MacNeill senior that MacNeill junior wouldn't pay a woman as much as a man. Although various phases of a business organization are essential to its operation, it does not follow that the phases involve equal work such as must be shown in an action based upon sex discrimination. Congress certainly did not intend such a result.

[6] The duties of Mrs. Orr and Messrs. Bruns and Rogan were greatly dissimilar even though each was the manager of a department. This without more precludes the characterization of the performance of their jobs as equal work. Hodgson v. Golden Isles Convalescent Homes, Inc., 5th Cir. 1972, 468 F.2d 1256.

It is clearly apparent from the undisputed evidence, including the testimony of Mrs. Orr, that Messrs. Bruns and Rogan had greater responsibility and were required to exercise greater skill in the performance of their jobs than was Mrs. Orr. Underwriting fire risks and appoving claims require the exercise of judgment and developed skill. The independent judgment of Mrs. Orr in purchasing supplies is not comparable to that involved in underwriting risks and settling claims.

The evidence failed to show sex discrimination. Judgment should have been entered for the appellant. The judgment for the appellee is reversed and the cause is remanded for the entry of a judgment for the appellant.

Reversed and remanded.

[1]

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
SOUTHERN DISTRICT OF FLORIDA

NO. 72-698-Civ-NCR

ELAINE M. ORR,

Plaintiff,

vs.

FRANK R. MacNEIL & SON. INC.,

Defendant.

U.S. Post Office Bldg.,
Miami, Florida
January 4, 1973,
9:30 o'clock, a.m.

The above-captioned matter came on for trial before The Honorable NORMAN C. ROETTGER, JR., United States District Judge, pursuant to notice.

APPEARANCES:

ROBERT W. HERVEY, Esquire,
On behalf of Plaintiff.

ALAN G. GREER, Esquire,
On behalf of Defendant.

[28]

TESTIMONY (EXCERTED)

ORR—DIRECT

Q That was January, 1967?
A Yes, sir.

Q In 1968 apparently we have a repeat performance.
A No, there was no increase. It stayed the same.

Q In 1969 there was another increase?
A Yes, sir.

Q And differentiation?
A Yes, sir.

Q Did you make any comment to anybody about that?
A Yes, I did.

Q To whom?
A To Frank MacNeil.

Q When did you do that?
A In January, 1969, when the increase slips went in.

Q What did you say to him?
A I said the same thing. I said, "Mr. MacNeil, I just don't understand why. We work in the same capacity. Our jobs are equally important. I probably know more about the general operation of the agency than anybody

in the company and why is it my [29] salary doesn't come up to the men's salary?" Well, I got the same information from him: Malcolm would not —

Q What was that information?

A Mr. Malcolm MacNeil would not pay a woman as much as a man, but he would try to work it out.

Q Who would try to work it out?

A Frank MacNeil. To let him discuss it with his son and he would try to work it out.

Q In 1970, there was a difference?

A Yes, sir.

Q Did you complain to anybody about that difference?

A To Frank MacNeill in his office.

Q When did you do that?

A In January, 1970.

Q What did you say to him?

A I said, "Mr. MacNeil, we have been going through this since 1968 and every year you have promised to work something out."

He said, "Well, we are going to make some changes and we are going to offer some stock options to managers; and give me a little bit of time

* * *

[112] * * * Q What has been your father's position with the company, Mr. Frank R. MacNeil, over the last eight years?

A He is president of Frank R. MacNeil & Son, but in fact when he had his stroke at age 80 —

Q When did Mr. MacNeil have the stroke, sir?

A Well, it was eight years ago, approximately eight years ago, and since that time he has not been in full management at all. In fact, the last four, five years, he doesn't spend more than three, four hours a day in the office. He doesn't manage any of the insurance affairs.

Q So, effectively, you are the manager of the company?

A Yes, sir.

Q Are you also an owner of the company?

A Yes, sir.

Q What is your ownership interest in the company?

A 48 percent.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

CASE NO. 7547

ELAINE M. ORR,

Petitioner,

vs.

FRANK R. MacNEILL & SON, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FRATES FLOYD PEARSON STEWART
PROENZA and RICHMAN, P.A.

ALAN G. GREER
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MIAMI REVIEW — 871-6553 — 877-3721

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1975

CASE NO. 7547

ELAINE M. ORR,

Petitioner,

vs.

FRANK R. MacNEILL & SON, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court's decision is unpublished (App. to Petition 12, 20). The opinion of the Court of Appeals for the Fifth Circuit *reversing* the District Court is reported at 511 F.2d 166 (App. to Petition 21).

QUESTION PRESENTED

Whether the Circuit Court correctly held that Petitioner, Elaine Orr, was not entitled to recover damages for sex discrimination in compensation as an employee under the Equal Pay and Civil Rights Act where the record reveals (1) she did not perform equal work; and (2) the pay scale was based on economic benefits to the employer.

STATUTES INVOLVED

The pertinent provisions of the Civil Rights Act, 42 USC §2000e et. seq. and 2000e-2 et seq. and the Equal Pay Act, 29 USC §206(d)(1) are set forth in Appendix to the Petition at pages 1, 5 and 11 respectively.

STATEMENT

Respondent, Frank R. MacNeill & Son, Inc. is a corporation operating as a general insurance agency representing and underwriting for various insurance companies in the Miami area. (R. 9). It is uncontradicted that for the past eight years, the overall manager (and one of the owners) of the company is Malcolm R. MacNeill, the son of Frank R. MacNeill & Son, Inc. (R. 112; App. to Pet. 37). The only evidence whatsoever of sex discrimination was Mrs. Orr's testimony that Frank R. MacNeill told her that "Mr. Malcolm MacNeill would not pay a woman as much as a man . . ." (R. 29). Frank R. MacNeill, 88 years old, who suffered a stroke in 1965 (R. 112; App. to Pet. 37) and who is no longer active in the management of the company, flatly denied having made the statement. (R. 100). Be that as it may, the trial court elected to believe Mrs. Orr and the

appellate court expressly stated "But, of course, this Court accepts the District Court's determination on credibility." (511 F.2d at 169; App. to Petition 28).

The evidence before the trial court is accurately summarized by the opinion of the Fifth Circuit Court of Appeals:

> "The [Petitioner], Elaine M. Orr, went to work for the agency in 1952, it then had four employees. At the end of 1970, the critical time in this controversy, there were over forty employees. In and after 1967 the organization consisted of four departments, Fire Insurance, Casualty Insurance, Claims and Accounting.
>
> "John F. Bruns, the head of the Fire Insurance Department, was originally employed by MacNeill as a Special Agent or Field Representative. He continued in that capacity after becoming a Vice President and Manager of the Fire Insurance Department. In addition to his General Supervisory activities in the Fire Insurance Department, his duties included handling the underwriting of the Fire Insurance Department and approving or disapproving fire risks. His primary responsibility and activity was the production of business. Bruns contacted agents, collected overdue accounts, and sought to develop new business for the agency. Upon one or more occasions Bruns established commission arrangements with a company represented by the agency. Malcolm MacNeill testified that this 'takes a lot of savvy.'

"The Casualty Insurance Department was in charge of James Moore. He was responsible for underwriting the Casualty Insurance business which was acceptable to the company. This responsibility specifically involved reviewing policies written by agents or instructing someone in the department to underwrite acceptable business. When an agent had a risk which he thought might not be acceptable to the company, the agent and Moore would discuss it, and Moore would decide whether or not to accept the risk. His job, as in the case of Bruns, required decision making and the exercise of discretion.

"The Claims Department was handled through a separate corporation which was a wholly owned subsidiary of Frank R. MacNeill & Son, Inc. It was in charge of Thomas B. Rogan. He was responsible for assigning all claims work which came into the office, for adjusting and settling claims, and for supervising, hiring, firing, and training approximately ten professional adjusters and ten clerical workers. Rogan had unlimited draft authority with several insurance and casualty companies represented by the agency. He issued loss drafts upon determining that claims should be paid. He assisted in the development of new business. His job, like those of Bruns and Moore, required the making of decisions and the exercise of discretion.

"Elaine M. Orr was head of the Accounting Department. She kept the financial and other records, she and others signed checks, she purchased

supplies and supervised the maintenance of the building which housed the agency. She was sometimes consulted by those in other departments but usually with respect to accounting matters.

"The salaries paid to the four department heads for the years 1966 through 1970, as found by the District Court, were as follows:

As of April	FIRE Bruns	CASUALTY Moore	CLAIMS Rogan	ACCOUNTING Orr
1966	10,400.00	8,996.00	9,100.00	10,400.00
1967	11,310.00	10,010.00	10,010.00	11,700.00
1968	15,002.00	10,816.00	14,001.00	12,012.00
1969	15,522.00	12,012.00	15,600.00	13,000.00
1970	18,018.00	14,040.00	18,018.00	14,040.00

"For the years 1969 through 1971 bonuses were paid as follows:

1969	1,000.00	500.00	500.00	500.00
1970	3,500.00	3,500.00	3,500.00	3,500.00
1971	3,500.00	2,500.00	3,500.00	1,500.00"

[511 F.2d at 168-169; App. to Petition 24-26]

The Court continued:

". . . . Bruns testified as to the differences between the production of business and the keeping of records and stressed the job differences. He expressed the opinion that they were of equal importance. Rogan also pointed out that the functions of the Accounting and Claims Departments were not similar, that the duties were different, and not comparable and that there was no parallel. In response to a leading question

> Rogan gave an affirmative answer to a query as to whether one function was just as important as another. In her testimony Mrs. Orr recognized the differences between that which she did and that which was done by Bruns and Rogan. She conceded that her accounting activities might be called a mechanical type of thing. She recognized the necessity for the use of judgment and the exercise of discretion in the production and claims departments, and conceded that this was not so in the Accounting Department except in the procurement of supplies." (511 F.2d at 169; App. to Petition 28).

Based on the above evidence the Fifth Circuit Court of Appeals properly reversed the District Court's finding of sex discrimination and correctly relied on the applicable, well established principles of law:

> "The sex discrimination provisions of Title VII of the Civil Rights Act of 1964 must be construed in harmony with the Equal Pay Act of 1963, 29 U.S.C.A. Sec. 206(d). Hodgson v. Brookhaven General Hospital, 5th Cir. 1970, 436 F.2d 719; Ammons v. ZIA Co., 10th Cir. 1971, 448 F.2d 117; Shultz v. Wheaton Glass Co., 3rd Cir., 421 F.2d 259, cert. denied, 398 U.S. 905, 90 S.Ct. 1969, 26 L.Ed.2d 64. . . ."
>
> * * *
>
> "To establish a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for equal compensation. Ammons v. ZIA Co., supra.

> "The jobs in question need not be identical, but they must be substantially equal. Brennan v. J. M. Fields, Inc., 5th Cir. 1974, 488 F.2d 443; Hodgson v. Corning Glass Works, 2d Cir. 1973, 474 F.2d 226; Hodgson v. Fairmont Supply Co., 4th Cir. 1972, 454 F.2d 490; Ammons v. ZIA Co., supra . . ." (511 F.2d at 170-171; App. to Petition 30-31).

The appellate court further discussed the evidence contained in the record:

> "The record does not support the determination that Mrs. Orr sustained her burden of proving equal work. The District Court stated that 'an Insurance Agency operation of this size depends with success upon the efficient functioning of all of its departments.' However true this may be it does not follow that all who participate in the efficient functioning are doing equal work.
>
> "The only evidence of sex discrimination is the controverted statement of Frank R. MacNeill that his son would not pay a woman as much as he paid a man. Yet the fact is that at one time Mrs. Orr was paid more than any of the men who were the other department heads. The fact is that she was paid more than the man who succeeded her and who, presumably, was doing work equal to that which she had done. The fact is that she was never paid less and much of the time was paid more than the salary of Vice President Moore who was the head of the Casualty Department. The facts show that the salary differences were based upon other reasons than the conjecture of

> MacNeill senior that MacNeill junior wouldn't pay a woman as much as a man. Although various phases of a business organization are essential to its operation, it does not follow that the phases involve equal work such as must be shown in an action based upon sex discrimination. Congress certainly did not intend such a result. (511 F.2d at 171; App. to Petition 32).

The Fifth Circuit Court of Appeals accurately concluded:

> "The duties of Mrs. Orr and Messrs. Bruns and Rogan were greatly dissimilar even though each was the manager of a department. This without more precludes the characterization of the performance of their jobs as equal work. Hodgson v. Golden Isles Convalescent Homes, Inc., 5th Cir. 1972, 468 F.2d 1256.
>
> "It is clearly apparent from the undisputed evidence, including the testimony of Mrs. Orr, that Messrs. Bruns and Rogan had greater responsibility and were required to exercise greater skill in the performance of their jobs than was Mrs. Orr. Underwriting fire risks and approving claims require the exercise of judgment and developed skill. The independent judgment of Mrs. Orr in purchasing supplies is not comparable to that involved in underwriting risks and settling claims.
>
> "The evidence failed to show sex discrimination. Judgment should have been entered for the [respondent] . . . ." (511 F.2d at 171; App. to Petition 33).

ARGUMENT

It is at once apparent from Mrs. Orr's petition that, dissatisfied with the ruling of the Fifth Circuit Court of Appeals, she seeks merely a second appellate review of her cause.[1]

The issue in the present case is uniquely narrow, and no tortured presentation of the facts below can convert it into a cause warranting review by this Court on certiorari. The Record below attests that the decision of the Circuit Court of Appeals is manifestly correct. There is no alleged conflict of decisions.[2] nor (considering the intent and history of the Acts involved) could any other result have been sustained. There is no important question of Federal law requiring decision by this Court.[3]

The sole basis for attempting to invoke the jurisdiction of this Supreme Court of the United States is that the appellate court usurped the trial court's function of weighing the evidence. (Petition 8-9). But the opinion herein, on its face, belies that contention: "But, of course, this Court accepts the District Court's determination on credibility." (511 F.2d at 169, App. to Petition, 28).

1. Petitioner Did Not Prove "Equal Work"

Contrary to Petitioner's contention, the appellate court considered only the undisputed evidence and Mrs. Orr's

[1]E.g. see Justice Taft's remarks in *Magnum County v. Coty*, 262 U.S. 159 at 163.

[2]See *U.S. v. O'Malley*, 383 U.S. 627 (1966) and *Egan v. City of Aurora*, 365 U.S. 514 (1961).

[3]*U.S. v. Muniz*, 374 U.S. 150 (1963).

own testimony and concessions in arriving at the controlling conclusion that Mrs. Orr had failed to sustain her burden of proving "equal work" within the meaning of the applicable Acts. (511 F.2d 170, 171; App. to Petition 29, 38).

All four cases relied on by Petitioner support the decision of the Fifth Circuit. (Petition 14-15). In *Schultz v. Corning Glass Works*, 319 F.Supp. 1161 (W.D.N.Y. 1970) the plaintiff—"inspectors" established the primary element necessary to carry their burden of proof—that the jobs "entail equal work . . . require equal skill, effort and responsibility." The uniquely different managerial positions here involved are not equal nor similar. In *Schultz v. Wheaton Glass Company*, 421 F.2d 259 (3rd Cir. 1971), the female selector-packers established that they performed identical work as the male selector-packers who received 10% more. No such facts are presently before this Court.

In *Wirtz v. Basic Incorporated*, 256 F.Supp. 786 (D. Nev. 1966), female laboratory analysts were entitled to the same wages as male laboratory analysts where the work was substantially equal and required equal skill, effort and responsibility. Here, Mrs. Orr herself recognized the difference between her duties and those of the men involved.

Ammons v. ZIA Company, 448 F.2d 117 (10th Cir. 1971) reiterated the established test that the plaintiff was required to establish "that the work performed by the three higher paid male workers was 'substantially equal' to that performed by her." The Court noted that a naked averment of job discrimination was insufficient to estab-

lish a *prima facie* case. Factual support that the female worker performed "equal work" which requires "equal skill, effort and responsibility" was essential to meet her burden of proof. The Court of Appeals correctly held that Mrs. Orr did not sustain that burden.

2. Respondent Proved That The Difference In Wages Paid To Petitioner And The Other Managers Was Based Upon Economic Benefits.

Mrs. Orr was unable to establish that she performed "equal work" because she admitted that the male managers were required to exercise independent judgment not required of her. It is uncontradicted that these judgments demanded a great deal of knowledge, skill and responsibility. Difference in responsibility and skill alone are sufficient to refute any claim of equal work. See, e.g. *Kilpatrick v. Sweet*, 262 F.Supp. 561 (M.D.Fla. 1967); 29 C.F.R. §800.130(b).

But additionally, respondent also proved the difference in economic benefit to the insurance agency. Messrs. Rogan and Bruns were both actively involved in bringing in new companies and the production of income, while Mrs. Orr admitted that she was in no way involved in the production of earnings. (R. 44, 113, 116).

In *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 594 (3rd Cir. 1973), the court stated:

> "We need go no further than to say the District Court was correct to hold in this case that eco-

> nomic benefits to an employer can justify a wage differential."

Economic benefit then, can clearly serve as a basis for a wage differential and in the instant case the evidence uncontradictedly established a profound difference in economic benefit to the Respondent between Petitioner's job and those of the other managers.

CONCLUSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq.* and the Equal Pay Act, 29 U.S.C. §206(d) were never intended to supplant the "reasonable business judgments" of the employers of this country. See *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d at 597 (3rd Cir. 1973). Nor were they intended to accomplish an absurd result. If Petitioner's contention that equal work means equal importance to the overall efficient operation of the business is carried to its logical end it would mean that female tellers must be paid the same as male loan managers, female waitresses must be paid the same as male chefs, female sergeants the same as male generals, and secretaries the same as attorneys. For each of these people are arguably equally important to the overall operation of each of their respective businesses. The Fifth Circuit correctly refused to permit such a clearly erroneous result.

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be denied.

Respectfully submitted,

By: /s/ Alan G. Greer

ALAN G. GREER

By: /s/ Bertha Claire Lee

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari was mailed this ____ day of July, 1975 to: ROBERT W. HERVEY, ESQUIRE and RICHARD H. W. MALOY & ASSOCIATES, P.A., Attorney for Petitioner, 370 Minorca Avenue, Coral Gables, Florida 33134.

ALAN G. GREER

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In the

Supreme Court

of the

United States

October Term, 1975

CASE NO. 75-47

ELAINE M. ORR,

Petitioner,

vs.

FRANK R. MacNEILL & SON, INC.,

Respondent.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF

ROBERT W. HERVEY, ESQUIRE and
RICHARD H. W. MALOY &
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370 Minorca Avenue
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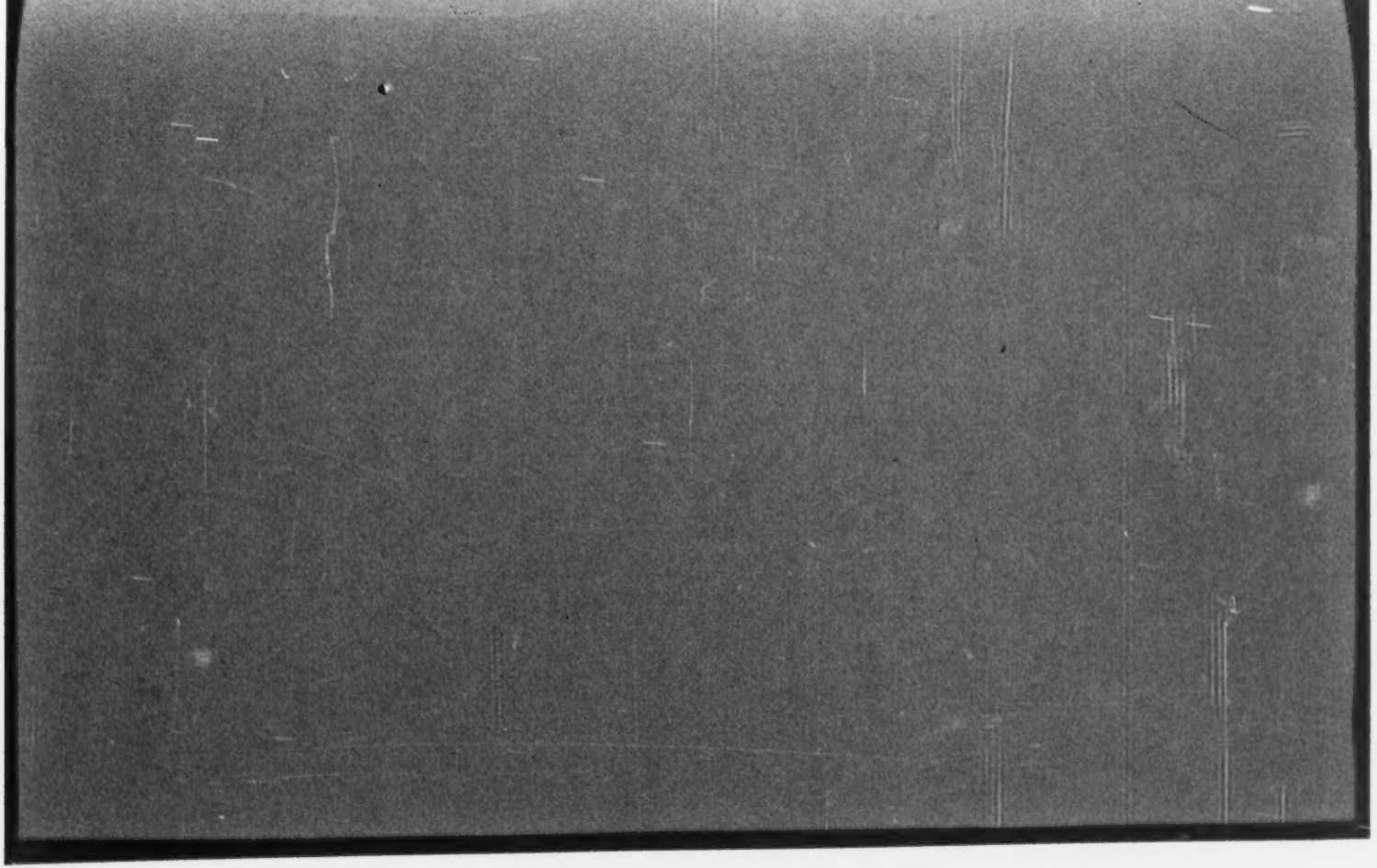

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in the
Supreme Court
of the
United States

October Term, 1975

CASE NO. 75-47

ELAINE M. ORR,

Petitioner,

vs.

FRANK R. MacNEILL & SON, INC.,

Respondent.

STATEMENT

The Petitioner, ELAINE M. ORR, hereby replies to the Brief of Respondent in Opposition to The Petition For Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit as follows:

In the Respondent's Brief, the Respondent makes the bald assertion that there is no evidence whatsoever of sex discrimination other than Mrs. Orr's testimony that Frank R. MacNeill had said: "Mr. Malcolm MacNeill would not pay a woman as much as a man . . . ." (Tr. 29) There is substantial evidence on this point in the record which the trial judge considered. In addition to Mrs. Orr's statement that sex discrimination was clearly involved, there was testimony of other sex discrimination practices in the company admitted by Malcolm MacNeill. Malcolm MacNeill, in his testimony, when asked if there were any other woman manager or vice president employed at Frank R. MacNeill & Son, Inc., answered in the affirmative and related that Mr. Moore was replaced by a woman subsequent to Mrs. Orr's leaving. The replacement, Linda Snyder, has the same duties as Mr. Moore and the same responsibility as Mr. Moore in the casualty department. On cross-examination Malcolm MacNeill related the following:

"Q. Is this lady making the same money Mr. Moore was when he left?
A. Yes, sir, approximately.

Q. How much is that?
A. I think Mr. Moore, if I recall the figures, was making $14,000 and she is making almost as much.

Q. On a temporary basis?
A. Yes, sir. I say almost as much. She is probably making $10,000, $10,100, $10,200." (Tr. 131)

Obviously either Malcolm MacNeill believes that a four thousand dollar discrepancy in salary is almost the same, or, he believes that it is a justifiable salary for a woman replacing a man in the same position.

In the converse situation, the male employee hired to replace Mrs. Elaine M. Orr in the accounting department with no prior experience in that position or company, or for that matter, in insurance related accounting, was immediately compensated at the same salary as Mrs. Orr had received after twenty years of service to the corporation. (Tr. 55) It is these disparities in compensation that alerted the trial judge to the obvious sex-related compensation rate that encouraged the district court judge to write:

> "Following Plaintiff's resignation, Defendant hired a replacement, Mr. Gaskins, who was hired at almost the same salary Plaintiff had been receiving, although he had considerably less experience. Defendant claims this evidence supports its position, but on the contrary it underlines the discrimination exercised against Plaintiff." (App. 16)

The appellate court discredited this finding of the District Court, but the basis of its position was a hypothetical proposition that if the successor's work was performed as well as Petitioner, he should receive equal pay. The appellate court has no jurisdiction to pose such hypothesis. Examination of the compilation of salaries of the Petitioner and the other vice presidents (App. 14) reveals that the discrepencies in salary commenced in 1968 which was the period during which Malcolm MacNeill assumed the responsibility for determining the amount of

compensation each vice president was to receive. Malcolm MacNeill stated that it was his decision alone to determine the compensation for his vice presidents and that the method arrived at in determining the specific compensation was never discussed or explained to the Petitioner. (Tr. 121)

As to the Respondent's contention that Frank R. MacNeill denied having made the statement that his son would not pay a woman as much as a man, it must be pointed out that Frank R. MacNeil did not deny having made that statement or admit that statement. (See R. 100). Respondent's reference to page 100 of the record (on page 2 of its brief) to the effect that Frank MacNeill denied making a statement about Malcolm MacNeill's position concerning payment of wages to women is absolutely incorrect. Reference to page 100 of the record reveals only equivocation on the part of MacNeill. His testimony on pages 103-104 of the record, moreover, is quite clear to the effect that Petitioner did make such complaint to him. It is clear that Frank R. MacNeill was approached by Mrs. Orr and she did submit to him written documents regarding her employment and the compensation she received stating that she was unhappy with that compensation. (Tr. 103-104)

The Respondent takes the position that the Petitioner did not perform "equal work" of substantially equal importance to the Respondent. That contention is not substantiated by the record. Petitioner testified as to the equal importance of the work of all four vice presidents of the corporation. (Tr. 28) Thomas B. Rogan, one of the four

vice presidents of the corporation, responded to testimony before the trial judge in the following fashion:

"Q. Are you familiar with the overall operation of a general agency?
A. Yes, I am.

Q. But you still can't answer this question from the standpoint that the operation of an accounting department and a claims department are equal insofar as the overall operation of the agency is concerned?
A. Well —

Q. One function is just as important as the other, is it not, Mr. Rogan?
A. Yes." (Tr. 81-82)

The testimony of Jack Bruns, another of the vice presidents, was as follows:

"Q. Mr. Bruns, would you say that the importance of the accounting department was equal to that of the fire department?
A. The importance?

Q. Yes, insofar as the general agency was concerned.
A. Yes, sir." (Tr. 88-89)

To further substantiate the alleged discrepancies in judgment necessary to perform the jobs, Bruns testified:

"There were certain procedures that were used in order to properly make up accounts for the agents and for company records based on business that was submitted by our agency, and I was unfamiliar with that particular facet of the business when I was recalled into the inside, or to be a manager of the fire department and Mrs. Orr was thoroughly familiar with all of the aspects of my department; therefore, I consulted in her and received advice as to the best way to properly handle it as far as an office manager, so as to speak, before." (Tr. 91-92)

He further testified:

"Q. Do you know whether or not Mrs. Orr performed any functions outside of the accounting department for the agency?

A. Over the years, yes, sir. She wasn't always in the accounting department. She had various duties.

Q. What were they?

A. Well, I can't really tell you except that she had worked in the various departments throughout the years that she had been there and had performed various duties and functions over the years. Whenever the need arose, she would attempt to do the job for the MacNeills." (Tr. 87-88)

ARGUMENT

Respondent on page 11 of its brief argues that the difference in wages paid to Petitioner and the other managers was based upon economic benefits.

Even the testimony of Malcolm MacNeill points to the "equal work" and equal responsibility of the Petitioner. It is undisputed that Petitioner assumed the management of the accounting department during 1963. (Tr. 38, 126) Malcolm MacNeill testified since that department was under the leadership of Mrs. Orr, the corporation has been continuously profitable. (Tr. 126) The trial judge also heard the unrefuted evidence of Elaine Orr, supported by the testimony of Bruns that it was Mrs. Orr who recovered some $80,000 from companies that had been overpaid due to a mix up in the bookkeeping system prior to her involvement and, that the management of Frank R. MacNeill & Sons, Inc. was unaware of that money being due them at the time. Bruns testified thusly "I really — I would have to say that she found money based on her efficiency that her predecessors were unable to locate or had caused to be unavailable, let's put it that way." (Tr. 90) Furthermore, as to making money for the insurance agency, it was also testified that Petitioner reduced the overhead $26,000 after she took charge in 1963 and from that year forward, the company has been consistently profitable. (Tr. 38, 126) From 1963-1971 she was able to perform all accounting duties without adding any additional personnel to that department while the insurance agency experienced continuous overall growth in terms of volume.

Respondent, on page 10 of its brief, describes the managerial positions in this case as "uniquely different".

It is interesting to note that the United States Court of Appeals in this case proclaimed that to be unique "a thing must be the only one of its kind, without an equal or an equivalent". The court indicated that every case is different from every other case. The court implied, therefore, that every case is "unique". If Respondent intended to use the term "unique" as the Fifth Circuit used that term, Petitioner will agree that the managerial positions are unique — just as all cases are unique. Such uniqueness of cases does not prevent the application of precedents.[1] A fortiori such uniqueness of positions should not prevent the application of the governing statute in Title 7 cases.

[1]It should be pointed out that the Circuit Court noted this principle with approval in its opinion but did not favor us with a citation of the governing precedents. We submit that the reason for the Court's lack of such citation is the total absence of governing precedents in this case, as we have indicated elsewhere in this brief.

CONCLUSION

The Conclusion of the Respondent's brief tries to read the identical job standards of the Equal Pay Act (29 USC 206 (d)) into the Civil Rights Act of 1964, (Title 7, 42 USC §2,000(e) et seq). We admit that every violation of the Equal Pay Act would likewise be a violation of Title 7, but not every violation of Title 7 is a violation of Equal Pay.

The *Robert Hall* case cited by Respondent in its Conclusion was an Equal Pay case. The instant case is a Title 7 case. In her Petition, Petitioner cited the District Court's opinion in *Robert Hall* since the philosophy and the semble of that decision were in harmony with the Petitioner's position in this case, to wit: the mere fact that an employer receives greater economic benefits from one employee than he receives from another employee will not effectively mask discrimination based purely upon the sex differences of the employees. Citation of the Circuit Court of Appeal's decision in *Robert Hall* by the Respondent in its Conclusion is improper in that, as stated above, the *Robert Hall* case was an Equal Pay case and the Third Circuit's holding was to the effect that under the undisputed fact situation there existed no discrimination based upon sex was established. The basis of the unequal pay was only the difference in economic benefits received by the employer from the male and female employees.

There were no clear-cut precedents to guide the trial judge in the instant case. The earlier Title 7 cases involved non-managerial positions—clerical jobs where one was a "mirror image" of the other. The trial judge recognized this when he stated the following in his Conclusion of Law:

> "This is not the typical production line case or retail clerks or bank tellers situation where the job requirements can be calibrated in minute detail." (App. 16, 17).

The trial judge correctly concluded that in this case of first impression there was nothing in the reported decisions or in the statute itself which made the statute inapplicable to managerial positions. Rarely is one managerial position a mirror-image of another. There is no requirement of absolute identity of positions as a prerequisite to application of Title 7. As pointed out in the Petition and in this brief, there was ample testimony upon which the trier of fact found that "blatant discrimination exists". (App. 18). The court saw through the employer's attempt to minimize the importance of the Petitioner's job for the sophistry it truly is when he, in his Findings of Fact and Conclusion of Law, wrote the following:

> "Defendant's contention is that the production departments are the important part of their business and without the production you don't need accounting. Malcolm MacNeill testified that the accounting department is in no way as important as the other departments and insurance companies never pay personnel in accounting departments as much as personnel in production departments; and that this situation exists in general agencies as well.
>
> Defendant's contention was disputed by the other two department heads, Mr. Bruns and Mr. Rogan, and the court finds an insurance agency

operation of this size depends with success upon the efficient functioning of all its departments." (App. 15).

"The court finds that the plaintiff has shown discrimination in salary based on sex.

1. Plaintiff has clearly shown the salary discrimination she suffered when her salary is compared with that of Mr. Bruns resulted from sexual discrimination." (App. 16).

The above findings by the court establishes a per se violation of 42 USC 2,000(e) et seq. The finding renders an appellate court powerless to reverse unless it retries the case de novo which, of course, it is powerless to do so.

As to the contentions of the Respondent that female tellers should make the same as male loan managers and other ludicrous arguments, it need only be pointed out that persons whose status within the corporation structure, as in the instant case, are of equal dignity and are of equal importance should be paid equal compensation. The Trial Judge in this case found that "an insurance agency operation of this size depends with success upon the efficient functioning of all its departments." (App. 15).

Petitioner respectfully requests that this court take jurisdiction of the case so as to settle the question of executive compensation pursuant to the Equal Employment Opportunites Act, Title 7, 42 USC 2,000(e) et seq. and give meaning to this legislative enactment to provide the

same safeguard against discrimination in compensation for the executive or manager as for the assembly line type worker.

Respectfully submitted this 22nd day of September, 1975.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response in Opposition was mailed to FRATES FLOYD PEARSON STEWART PROENZA & RICHMAN, P.A., Attorneys for Respondent, Twelfth Floor Concord Building, Miami, Florida 33130, this 22nd day of September, 1975.

Richard H. W. Maloy

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